TR USAH LUTONG & ORS A

v.

LEMBAGA TABUNG HAJI & ORS

HIGH COURT SABAH & SARAWAK, BINTULU B
HAMID SULTAN ABU BACKER JC
[SUIT NO: 22-8–2003 (BTU)]
28 APRIL 2009

NATIVE LAW AND CUSTOM: *Land dispute - Customary right* C
over land - Claim for - Native customary rights acquired under s. 10(3) Sarawak Land Code - Whether created positive rights - Whether plaintiff's claim for absolute right to full area flawed - Whether claim only limited to area in which plaintiffs felled and occupied - Whether plaintiffs D
have obtained substantial payment in consideration - Whether plaintiffs attempting to denigrate from previous terms

LAND LAW: *Customary land - Native rights - Claim for - Native customary rights acquired under s. 10(3) Sarawak Land Code - Whether created positive rights - Whether plaintiff's claim for absolute right to full* E
area flawed - Whether claim only limited to area in which plaintiffs felled and occupied - Whether plaintiffs have obtained substantial payment in consideration - Whether plaintiffs attempting to denigrate from previous terms

The plaintiffs' claim was based on native customary rights and/or F
rights acquired pursuant to permit issued under s. 10(3) Sarawak Land Code (SLC). According to the plaintiffs, they acquired native customary rights over the area of the land which they have been permitted to fell, measuring about 521.593 hectares. The plaintiffs G
alleged that unknown to them provisional lease was granted in respect of Lot 2 Block 34 Kemena Land District and Lot 2 Block 4 Selezu Land district to the first and third defendants, which formed the second defendants' Ladang Sawit Bintulu Sdn Bhd and the part of the said land was overlapping with the native H
customary land under the permit. The first to third defendants submitted that the area claimed by the plaintiffs relating to their land had been paid pursuant to an *ex gratia* payment of RM164,000 without admission of the plaintiffs' rights and as per the agreement, the plaintiffs had relinquished the rights over the I
permit, pursuant to a letter of discharge and disclaimer and letter of confirmation and undertaking. The fourth and fifth defendants alleged the terms stated in the permit was vague and the permit must fail for uncertainty, as the area was not properly identified.

Held (dismissing plaintiffs' claim):

(1) The reading of s. 10(3) SLC clearly show that the said section does not create positive rights in contrast to s. 5 of the SLC. Further the section relates to penal sanction. If permission was granted to the plaintiffs, the plaintiffs could only do the acts permitted in the said permit. In this case, the permit was issued to fell virgin jungle and that did not mean the plaintiffs could exercise all of their native customary rights, if any, pursuant to the said permit. In this case, no evidence was adduced to show that the plaintiffs have felled trees and in occupation of the land. Though, there was some documentary evidence produced by the first to third defendants showed that they had abandoned their rights. (para 8)

(2) The plaintiffs claimed that they were entitled to 521.593 hectares. The permit *per se* did not say that the plaintiffs were the exclusive persons to enjoy the said land, as stipulated by natural boundaries. The plaintiff adduced evidence of a surveyor who had produced a survey report in respect of the boundaries but the defendants argued that the witness was not a registered surveyor and s. 17 of Land Surveyor Ordinance 2001 prohibited him from professing as a surveyor. The defendants' argument had merit. In any event, as stated in the permit, they could fell virgin jungle in the stated area; that did not mean they could fell the whole of the virgin jungle. There are many provisions even made pursuant to Rajah's order as early as 1875 to control excessive use of land. Further, the secretariat circular no. 12/1933 particularly said that no community or individual may hold up in excess of their requirements. Clearly, there could not be an excessive user. In the instant case, for the plaintiffs to claim absolute right to the full area was flawed. The plaintiffs' claim could only be limited to the area in which they have felled and occupied. (para 8)

(3) The plaintiffs have received compensation from the first to third defendants and agreed not to make any claim. However, the plaintiffs said that it did not cover all the areas and the document was not explained. This court could not accept the plaintiffs' version. Further, there was no application or prayer to set aside the documents which the plaintiffs signed with the first and third defendants. Also the plaintiffs obtained

substantial payment in consideration and by this suit were attempting to denigrate from the previous terms. That should not be allowed at this late stage, more so when the plaintiffs have voluntarily given away possession. (para 8)

Case(s) referred to:

Bisi Jinggot v. Superintendant of Lands and Survey, Kuching Division & Ors [2008] 5 CLJ 606 HC ***(refd)***

Chelingga Asuli v. Wong Siew Yung (Sibu CS-21-3-2004) (Unreported) ***(refd)***

Keliment Nyapong v. Ushiabina Sdn Bhd [2008] 1 LNS 550 HC ***(refd)***

See Hua Realty Bhd v. See Hua New Holding Sdn Bhd [2007] 7 CLJ 152 HC ***(refd)***

Legislation referred to:

Land Surveyor Ordinance 2001, s. 17

Sarawak Land Code, ss. 5, 10(3)

For the plaintiffs - John Antau; M/s Tang & Antau Co Advocates

For the defendants - M/s Hamzah & Ong Advocates

For 4th & 5th defendant - Legal Officer, State Attorney-General's Chambers, Kuching

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the plaintiffs' claim based on native customary rights and/or rights acquired pursuant to permit issued under s. 10(3) Sarawak Land Code (SLC) and seeks the following prayers:

> Wherefore the plaintiffs claim against the defendant: (i) A declaration that they have acquired and or created individual and communal native customary rights over the said lands and are still the lawful proprietors of the same; (ii) A declaration that this right precludes any one or more of the defendant(s) from impairing or abridging the Plaintiffs' rights in the said land; (iii) A declaration that their rights have been impaired and or abridged by the said provisional leases; (iv) A declaration that the issue of the said provisional leases in so far as they impair and abridge the Plaintiffs' rights in the said land, is bad; (v) A declaration that as a result of the impairment and abridgement of their native customary rights over the said lands, they have consequently

A suffered loss and damage; (vi) A declaration that the 4th defendant is precluded from issuing any lease(s) provisional or otherwise which affect(s) the plaintiffs' rights; (vii) A declaration that the act or deed of the 4th defendant in issuing the said provisional leases in so far as it/ they affect(s) the plaintiffs rights is void and or
B wrongful; (viii) A declaration that the issue of the said provisional leases over the said land is in violation of article 5(1) of the Federal Constitution; (ix) A declaration that the issue of the said provisional leases over the said lands in violation of Article 8(1) of the Federal Constitution; (x) A declaration that the issue of the said provisional leases over the said lands in violation of
C Article 13(2) of the Federal Constitution, (xi) A declaration that the 1st, 2nd and 3rd defendants and or its servants or agents are trespassing on the said land and or otherwise; (xii) An order that the plaintiffs' be given vacant possession of the said land forthwith; (xiii) A prohibitory injunction restraining the 1st, 2nd
D and 3rd defendants and or its servants or agents from trespassing, entering, using clearing and or occupying the said land; (xiv) A mandatory injunction against the 1st, 2nd and 3rd defendants and or their servants or agents to cease operation and remove all structures, equipment and machineries from the said land; (xv) For general damages and *mes ne* profits; (xvi)
E Exemplary or alternatively aggravated damages; (xvii) Interests; (xviii) Costs; and (xix) Such other order and reliefs as the Honourable Court deems fit or just.

[2] At the commencement of the hearing, parties have agreed
F that the case can be heard by way of: (i) witness statement for examination-in-chief; (ii) preliminary cross-examination witness statement, with full liberty to further cross-examine orally (for purposes of cross-examination); (iii) preliminary re-examination statement with full liberty to further re-examination if there is
G further oral examination.

[3] The court is extremely grateful to the parties for agreeing to such a mode as the preliminary cross-examination witness statement will save much of the court's time to deal with peripheral matters and for all practical purposes, preliminary cross-
H examination witness's statement will stand as interrogatories and answers thereto only, as the right of oral cross-examination to the litigant is preserved during the whole trial.

I

Brief Facts

[4] The plaintiffs' claim that they have acquired native customary rights over the area of the land which they have been permitted to fell, pursuant to permit issued under s. 10(3) of SLC, measuring about 521.593 hectares. (Though the permit does not say so). The permit only says as follows:

> Ref: No. 16 in Q21
>
> District Office
> Bintulu
> 24th April 1961
>
> Permit to fell virgin jungles
>
> 28 door from Rumah Remang, Sebungan are hereby permitted under Section 10(3) of the land code to fell hutan tua in the ulu Sebungan sa-belah kiri mudek from Nanga Balim to the ulu.

[5] Plaintiffs alleged, unknown to them, provisional lease was granted on 2 December 1996 in respect of Lot 2, Block 34 Kemena Land district and Lot 2 Block 4 Selezu Land district to the 1st and 3rd defendants, which forms the 2nd defendants' Ladang Sawit Bintulu Sdn. Bhd. and the part of the said land is overlapping with the native customary land under the permit. The plaintiffs admit that they have received compensation for small portion of permit from the 1st defendant relating to field known as lot (F/L) 1A containing an area of 25.78 hectare more or less and claim that the area under the permit which remains unpaid is 436.283 hectares. In consequence they claim compensation for their native customary land, interests and costs in their submission though it was not pleaded. The 1st to 3rd defendants say the area claimed by the plaintiffs relating to their land has been paid pursuant to an *ex gratia* payment of RM164,000 without admission of the plaintiffs' rights and as per the agreement, the plaintiffs have relinquished the rights over the permit, pursuant to a letter of discharge and disclaimer dated 24 February 1999 and letter of confirmation and undertaking dated 24 February 1999.

[6] The 4th and 5th defendants alleged the terms stated in the permit is vague and the permit must fail for uncertainty, as the area was not properly identified. The area which was issued with the provisional lease was part of Similajau Forest Reserve which was constituted on 1 November 1953. An aerial photo was prepared by the Department of Lands and Surveys and shows that most of the area was still virgin jungle in the year 1962.

A

Preliminaries

[7] I note in this case that the plaintiffs have mounted their relief on prolix declaratory orders but their submission was focused on compensation. The prayers of the prolix declaratory orders and
B injunctions in the manner pleaded warrants the court not to grant the discretionary relief (if any) and dismiss the suit. (see *See Hua Realty Bhd v. See Hua New Holding Sdn Bhd* [2007] 7 CLJ 152 HC (Kuching OP-26-02-2003-II.) Further the submission for compensation, inconsistent with the prayers also requires the suit
C to be dismissed in *limine*. However, I have taken a safer approach of considering the merits of the case.

[8] I have heard the evidence, read the pleadings, documents and submission of the parties in detail. I take the view the plaintiffs' claim must be dismissed. My reasons are as follows:
D

i. The plaintiffs anchored their claim based on native customary rights. I have dealt with this law and jurisprudence in respect of native customary rights in Sarawak in a number of judgments namely (i) *Bisi ak Jinggot vs Superintendant of Lands*
E *and Surveys, Kuching Division & Ors* [2008] 5 CLJ 606 HC (Kuching S-22-11-2002-II) (ii) *Chelingga ak Asuli v. Wong Siew Yung* (Sibu CS-21-3-2004) (iii) *Keliment ak Nyapong v. UsiaBina Sdn Bhd* [2008] 1 LNS 550 HC (Sibu CS 22-37-2005) etc. I do not wish to repeat the same here, save that
F this judgment must be read with those judgment for comprehensiveness of the law. In this case the plaintiffs are relying on s. 10(3) by SLC which reads as follows:

> Without prejudice to any law for the time being regulating
G the prospecting for minerals and mineral, oils or the taking of forest produce, any native who, without a prior permit in writing from a Superintendent, occupies any Interior Area Land or fells or attempts to fell virgin jungle upon any such land or attempts to create customary rights upon any such land shall be guilty of
H an offence: Penalty, in the case of a first offence, a fine of one thousand ringgit and, in the case of a second or subsequent offence, imprisonment for two years and a fine of five thousand ringgit.

I

The reading of the said sub-section will clearly show that the section does not create positive rights in contrast to s. 5 of SLC. Further the section relates to penal sanction. If permission is granted to the plaintiffs, the plaintiffs can only do the acts permitted in the said permit. In this case, the permit is issued to fell virgin jungle and that does not mean the plaintiffs can exercise all of their native customary rights, if any pursuant to the said permit. In this case, no evidence was adduced to show that the plaintiffs have felled trees and in occupation of the land. Though, there was some documentary evidence produced by 1st to 3rd defendant to show that they have abandoned their rights.

ii. Further the plaintiffs claim that they are entitled to 521.593 hectares. The permit *per se* does not say that the plaintiffs are the exclusive persons to enjoy the said land, as stipulated by natural boundaries. The plaintiffs have adduced the evidence of a surveyor who has produced a survey report in respect of the boundaries but the defendants say that the witness is not a registered surveyor and s. 17 of Land Surveyor Ordinance 2001 prohibits him from professing as a surveyor. The defendants' argument has merit. In any event, I take the view that as stated in the permit, they can fell virgin jungle in the stated area. That does not mean they can fell the whole of the virgin jungle. This is because, there are many provisions even made pursuant to Rajah's order as early as 1875 to control excessive use of land. Further the Secretariat Circular No. 12/1933 particularly says that no community or individual may hold up in excess of their requirements. I do not wish to go through the provision in detail. They are found in the submissions. However, it is clear that there cannot be excessive user. In the instant case, for the plaintiffs to claim absolute right to the full area is flawed. The plaintiffs' claim can only be limited to the area which they have felled and occupied only.

iii. In this case, evidence was adduced to say that the plaintiffs have received compensation from the 1st to 3rd defendants and agreed not to make any claim. However, the plaintiffs say that it does not cover all the area and the document was not explained. I do not accept the plaintiffs' version. Further, there was no application or prayer to set-aside the documents

which the plaintiffs have signed with the 1st and 3rd defendants. Further, the plaintiffs have obtained substantial payment in consideration and by this suit are attempting to denigrate from the previous terms. I think, that should not be allowed at this late stage, more so when the plaintiffs have voluntarily given away possession.

[9] For the reasons stated above, I dismiss the plaintiffs' claim with no order as to costs.

[10] I hereby order so.